No. 2999.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EVA MAY GILL,
Appellant,
vs.
FILLMORE WHITE,
Appellee.

BRIEF OF APPELLEE.

REUBEN G. HUNT,
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Filed this.....day of February, A. D. 1918.
FRANK D. MONCKTON, Clerk.
By....., Deputy Clerk.

Rincon Pub. Co., 689 Stevenson St., S. F.

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STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court of Northern California granting to Fillmore White a discharge in bankruptcy.

The bankrupt filed his petition for discharge (Trans., p. 3); Eva May Gill, the appellant herein, filed specifications of grounds of opposition to the bankrupt's discharge (Trans., p. 5); the matter was referred to the referee in bankruptcy as Special Master to ascertain and report the facts and his conclusions thereon, and the Special Master held a hearing and presented his report to the District Judge (Trans.,

p. 10); Eva May Gill then filed exceptions to the report of the Special Master (Trans., p. 19); and the District Judge thereupon overruled these exceptions, confirmed the report of the Special Master, and granted the discharge (Trans., p. 30).

Three grounds of opposition to discharge were presented by Eva May Gill:

The first is based upon Section 14 b (2) of the Bankruptcy Act, and is that the bankrupt, with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained (Trans., p. 5). As to this ground, the Special Master, after setting forth the evidence in his report, found that the same was not proven (Trans., p. 11).

The second ground is based upon Section 14 b (4) of the Bankruptcy Act, and is that, within four months immediately preceding the filing of the petition in bankruptcy, the bankrupt transferred, removed, destroyed, concealed and permitted to be removed, destroyed and concealed certain of his property with the intent to hinder, delay and defraud his creditors (Trans., p. 6). As to this ground, the Special Master, after setting forth the evidence in his report, found that the same was not proven (Trans., pp. 12 and 13).

The third ground is based upon certain alleged fraudulent transactions (Trans., p. 6-9), but the Special Master, in his report, held that the facts alleged in this ground, even if true, were not sufficient to constitute a ground of opposition to discharge within the provisions of Section 14 of the Bankruptcy Act, and

refused to receive any testimony concerning the same (Trans., p. 16).

During the hearing before the Special Master, the wife of the bankrupt was called as a witness against him. The bankrupt, through his counsel, refused to consent to the examination of the wife against him; and an objection by counsel for the bankrupt to her testimony was sustained by the Special Master.

We take it that on this appeal the only facts that can be considered by the appellate court are those which are set forth by the Special Master in his report (Trans., p. 10-18), and by the District Judge in his opinion (Trans., p. 30). Appellant, in her "Statement of the Case," has referred to as facts the allegations contained in her third ground of opposition to discharge (Trans., p. 6-9), and the allegations set forth in her exceptions to the report of the Special Master (Trans., p. 19-30), whereas no testimony was ever introduced to prove such allegations, or any of them, and none of such allegations were ever admitted to be true.

The purpose of appellant, no doubt, in so assuming as facts these unproven and unadmitted allegations, is to make it appear that Eva May Gill was defrauded by the bankrupt. While these allegations may make out a *prima facie* case from appellant's point of view, there is, of course, another side to the story which does not appear in the appellant's "Statement of the Case." The bankrupt was defrauded out of many thousands of dollars by the husband of Eva May Gill; in fact, was relieved of every cent he had. The

shoe is really on the other foot. We contend, however, that these are matters entirely outside of the record and have no bearing on this appeal, and refer to them only so that the Court may not get a mistaken impression as to the matters before it from appellant's "Statement of the Case."

BRIEF OF THE ARGUMENT.

1. The finding of the Special Master, approved by the District Judge, that the first and second grounds of opposition to discharge were not proven, is amply sustained by the evidence.

Trans., p. 10-18.

2. Even if the evidence be regarded as conflicting, the Circuit Court of Appeals will not upset a finding of the Special Master concurred in by the District Judge except in case of a plain mistake, and no mistake appears in this case.

Ohio Valley Bank vs. *Mack,* (C. C. A. 6th Cir.) 20 Am. B. R. 40, 163 Fed. 155;
Trans., p. 10-18.

3. The third ground of opposition to the discharge has no foundation in the bankruptcy act.

Bankruptcy Act, Sec. 14 and Sec. 17, Sub. 4;
Trans., p. 6-9, 16.

4. The wife could not be compelled to testify against the bankrupt husband without his consent.

Sec. 858, U. S. Revised Statutes; 34 Stat. L. 618; Fed. Stat., Ann. Supp. 1909, p. 708; Comp. Stat. Supp. 1909, p. 242;
In re Kessler, 35 Am. B. R. 40, 225 Fed. Rep. 394;
Subd. 1 of Sec. 1881 of Code of Civil Procedure of California.

5. The wife's competency to testify is a moot question in this case.

Trans., p. 30.

ARGUMENT.

1. The finding of the Special Master, approved by the District Judge, that the first and second grounds of opposition to discharge were not proven, is amply sustained by the evidence.

1. It would be idle to repeat here the evidence contained in the record (Trans., p. 10-18). A perusal of the same will show conclusively that the evidence received at the hearing was all in favor of the bankrupt.

2. Even if the evidence be regarded as conflicting, the Circuit Court of Appeals will not upset a finding of the Special Master concurred in by the District Judge except in case of a plain mistake, and no mistake appears in this case.

2. We believe that the evidence set forth in the report of the Special Master (Trans., p. 10-18) is not conflicting: is entirely in favor of the bankrupt, but, even though such evidence be regarded as conflicting, the rule is well established that a finding of a Special Master concurred in by the District Judge will not be disturbed on appeal except in case of plain mistake. Surely no mistake appears in this record.

The leading case upon this subject is *Ohio Valley Bank* vs. *Mack* (C. C. A. 6th Cir.), 20 Am. Bank. Rep. 40; 163 Fed. 155, where Circuit Judge Lurton said at page 158:

> "No arbitrary rule can be laid down for determining the weight which should be attached

to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report. *Tilghman* v. *Proctor,* 125 U. S. 137; 8 Sup. Ct. 894; 31 L. Ed. 664; *Davis* v. *Schwartz,* 155 U. S. 631; 15 Sup. Ct. 237; 39 L. Ed. 289; *Emil Kiewert & Co.* v. *Juneau,* 78 Fed. 708; 24 C. C. A. 294; *Tu River Co.* v. *Brigel,* 86 Fed. 818; 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon review, should not disturb his findings unless there is most cogent evidence of a mistake and miscarriage of justice. Loveland on Bankruptcy, section 32a; *In re Swift* (D. C. Mass.), 9 Am. B. R. 237; 118 Fed. 348; *In re Rider* (D. C. N. Y.), 3 Am. B. R. 178; 96 Fed. 811; *In re Waxelbaum* (D. C. Ga.), 4 Am. B. R. 120; 101 Fed. 228; *In re Stout* (D. C. Mo.), 6 Am. B. R. 505; 109 Fed. 794; *In re Miner* (D. C. Oreg.), 9 Am. B. R. 100; 117 Fed. 953. In this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the *bona fides* of the claim preferred by Charles Mack, Sr. The conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge. Under such circumstances, this court is not warranted in over-

turning the conclusions of two courts upon anything less than a demonstration of plain mistake."

3. The third ground of opposition to the discharge has no foundation in the bankruptcy act.

3. The third ground of opposition to the discharge has no foundation in the bankruptcy act. As pointed out by the Special Master in his report (Trans., p. 16), the facts alleged in this third ground concern only the dischargeability of the claim of Eva May Gill and do not affect the bankrupt's right to a general discharge. Section 17, subdivision 4 of the Bankruptcy Act provides:

> "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as were created by his fraud * * *"

The grounds of opposition to the general discharge of a bankrupt are set forth in Section 14 of the Bankruptcy Act. An examination of these grounds shows conclusively that the third ground of opposition fits none of them.

4. The wife could not be compelled to testify against the bankrupt husband without his consent.

4. Section 21a of the Bankruptcy Act as amended in 1903 provides as follows:

> "A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process

> of administration under this Act; Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

If this section now prevailed, the order of the referee sustaining the objection to the wife's testimony might be erroneous, but, on June 29, 1906, Congress passed an act so that Section 858 of the Revised Statutes of the United States now reads:

> "The competency of a witness to testify in a civil action, suit or proceeding in the Courts of the United States shall be determined by the laws of the State or territory in which the Court is held."
>
> 34 Stat. L. 618; Fed. Stat. Ann. Supp. 1909, p. 708; Comp. Stat. Supp. 1909, p. 242.

It was held in the case *In re Kessler,* 35 Am. Bank. Rep. 30; 225 Fed. Rep. 394, that a proceeding in bankruptcy is unquestionably a civil action, suit or proceeding and the competency of the wife to testify in a bankruptcy proceeding against her husband is governed by the laws of the State in which the bankruptcy proceeding is pending.

Subdivision 1, of Section 1881, of the Code of Civil Procedure of the State of California, provides as follows:

> "A husband can not be examined for or against his wife without her consent; *nor a wife for or against her husband, without his consent;* nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other

> during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceedings for a crime committed by one against the other; or in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife or in an action for damages against another person for adulterv committed by either husband or wife."

Under this section a wife cannot be examined against her husband without his consent. There are certain exceptions which do not apply here. Under this act of Congress of 1906, the competency of the wife of Fillmore White to testify against him upon the opposition to discharge is to be determined by the laws of the State of California, wherein the bankruptcy proceeding is pending. We have seen that such laws do not permit her testimony against him without his consent.

5. The wife's competency to testify is a moot question in this case.

The District Judge in his opinion said (Trans., p. 30):

> "The question of law presented as to whether the wife of the bankrupt was a competent witness who could be compelled to testify at the instance of the creditor opposing bankrupt's discharge upon the hearing of such opposition before the referee need not be decided. It is only when the transfer of property with intent to defraud his creditors has been made by the bankrupt within four months immediately preceding the filing of his petition that such transfer is made a ground

> of opposition to his discharge. All the testimony shows, the referee finds, and counsel admitted at the argument of his exceptions before this Court, that the transfers to the wife of which he complains were made long before the beginning of the four months period. In such case the wife's testimony even if competent could not affect the result."

It seems to us that under these circumstances, the competency of the wife of Fillmore White to testify upon the opposition to discharge is purely a moot question. Her testimony would bring out nothing other than what is already disclosed by the record. As said by the District Judge, therefore, the question of law presented need not be decided.

CONCLUSION.

Many points are made by appellant in her "Brief of the Argument" that have no bearing whatever upon this appeal. This is purely an opposition to discharge. Questions relating to the general examination of the bankrupt at meetings of creditors, rights of action in the trustee to set aside on the ground of fraud transfers of property more than four months before the filing of the petition in bankruptcy, etc., we take it, are not involved here.

We contend that there are but four questions involved on this appeal:

(1) Is the finding of the lower court that the first ground of opposition was not proven, sustained by the evidence?

(2) Is the finding of the lower court that the second ground of opposition was not proven, sustained by the evidence?

(3) Do the facts alleged in the third ground constitute a ground of opposition to discharge under Section 14 of the Bankruptcy Act?

(4) Is the wife competent to testify against her bankrupt husband upon an opposition to his discharge without his consent.

As to the fourth question, we further contend that it is purely a moot question in this case.

Respectfully submitted,

REUBEN G. HUNT,

Attorney for Appellee.